Board of Alien Labor Certification Appeals

UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'

DATE: February 27, 1997

CASE NO: 95-INA-260

In the Matter of:

FIVE OCEANS TRAVEL
Employer,

On Behalf of:

SAI FAN CHIANG,
Alien

Appearance: J. P. Samuels, Esq., Los Angeles, California
for the Employer and the Alien

Before: Huddleston, Holmes, and Neusner Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Sai Fan Chiang (Alien) filed by Five Oceans Tours (Employer) pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5) (A) (the Act), and the regulations promulgated in 20 CRF, Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at San Francisco, California, denied the application and the Employer and the Alien requested review pursuant to 20 CFR S 656.26.

Statutory authority. Under S 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers

similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR S 656.27(c).

STATEMENT OF THE CASE

Application. On April 28, 1993, the Employer applied for labor certification to enable, the Alien, a Hong Kong national, to fill the position of bi-lingual aassistant manager of a travel agency located in Los Angeles, California.

The job offered was described as follows:

> Employer is a travel agency specializing in tours to the far east, including but not limited to Hong Kong, Taiwan, etc. Employer needs the services of a bilingual assistant manager to assume control of the travel agency when employer is not available. Employee's duties limited to speaking Mandarin, Cantonese, Chinese & English to be able to make arrangements for tours to the far east and accompany various tours when necessary. Employee must have knowledge of mainland China, know how to use computer programs for travel agencies. Employee does not have power to hire and fire but will oversee other employees to complete travel arrangements.

AF 101. The formal educational requirement is high school graduation. The required experience is two years in the job offered or in the related occupation of "bilingual consultant."

Notice of Findings. On March 28, 1994, the CO issued a Notice of Findings advising the applicant of the Department of Labor's intention to deny the application, and permitting the applicant to rebut the findings or to remedy the defects noted on or before May 2, 1994. 20 CFR § 656.25(c).

Addressing defects arising under 20 CFR S 656.21(b)(2), the Co said the foreign language requirement appeared to be tailored to meet the Alien's background and qualifications, explaining that few U. S. workers would qualify for the position described. observing that a foreign language is not usually needed and that most employers conduct their affairs in the English language, the

Co said the requirement of the ability to speak Mandarin and. Cantonese Chinese dialects was unduly restrictive in this case. The **CO** added that Employer's documentation did not explain (1) how the foreign language will be used in executing the duties of this job, (2) where and when the language will be used by the Employee and with whom, (3) how the work of the position was completed in the past without the Employee's use of the language, (4) whether the absence of the Employee's fluency in the language will have an adverse impact on the Employer's business, (5) how the need for the use of the foreign language is handled with other ethnic groups, and (6) the proportion of the Employer's business that is dependent on the use of the language at issue. AF 94-95.

Under 20 CFR § 656.21(b)(2) the Employer was given the option (1) to establish the business necessity of the foreign language, (2) to delete the requirement for the foreign language and readvertise the position, or (3) to demonstrate that the use of the foreign language is customary or normal in the United States. In an effort to assist and guide the response to this demand for added proof or argument, the CO explained that the Employer must demonstrate a link between this job requirement and the Employer's business and that this job requirement is related to the job duties the employee must perform. **Sysco Intermountain Food Services,** 88-INA-138(May 31, 1989). If Employer elected to prove the business necessity of its language requirement or to show that this restrictive requirement is normal or customary for the industry, occupation and working conditions, the CO requested that the following questions be answered with documentation and data: (1) a list of Employer's clients who cannot communicate in English, (2) a list of employees who speak the foreign language, (3) statistical data showing the number of persons in Employer's community who speak the foreign language, and (4) a map showing the location of the Chinese speaking population in relation to the location of Employer's place of business. AF 95. To demonstrate that this foreign language requirement is normal or customary, the Employer was instructed to provide evidence that its use had been required in the past. AF 96-97.

Rebuttal. By its rebuttal of August 9, 1994, the Employer explained (1) that its existing staff speaks Chinese, (2) some 90% of its customers are Chinese and nearly all of them conduct business only in Chinese, and (3) arranging and accompanying tours in China requires the Employee to speak Chinese because internal travel business in China is transacted only in Chinese. In addition, Employer pointed out that its travel brochures are in Chinese, although some of its documents are in both Chinese and English. AF 38-39. The Employer supplemented this statement with evidence that its classified telephone listing is in both Chinese and English, that a high proportion of the population in the area near its place of business was of Asiatic origin, and the text of its promotional literature for all destinations was in Chinese

with minimal use of English language text. AF 52-80.[1]

Final Determination. After examining the arguments and documentation that Employer filed as rebuttal, the **CO** denied this application for certification on August 16, 1994. Rejecting the Employer's arguments in support of its language requirement, the CO said its evidence showed that not more than one-third of the population in the Employer's ZIP code mail area were Chinese and that it failed to indicate either the number or the proportion of the population that spoke Chinese in either dialect. Moreover, the CO noted, Employer's office was sufficiently well staffed with Chinese speaking employees to handle such business as could not be transacted without the use of either Mandarin or Cantonese Chinese. For these reasons the CO concluded that the Employer did not sustain its burden of proof under 20 CFR S 656.21(b)(2).

Employer's appeal. The Employer's September 9, 1994, appeal from the CO's denial of certification offered added arguments and resubmitted several of the Employer's rebuttal exhibits. AF 03-33.

Discussion. The Employer now contends that historically it had "always" hired Chinese speaking individuals. As its argument concerning the Employer's historical usage relies on documents that were not found in the record, the weight this argument merits is questionable. See AF 02, 16. **Capriccio's Restaurant,** 90-INA-480(Jan 7, 1992); **Kelper International Corp.,** 90-INA191(May 20, 1991); **Kogan & Moore Architects, Inc.,** 90-INA-466(May 10, 1991). On the other hand, when considered with Employer's reasons for rejecting two applicants whose resumes set forth the requisite language qualifications, however, the skills required to meet Employer's language criteria appear much less important than the arguments of the Employer and the finding of the CO suggested.

The Employer's application first said the "Employee's duties [would be] limited to speaking Mandarin, Cantonese, Chinese & English to be able to make ' arrangements for tours to the far east and accompany various tours when necessary." It then added that the "Employee must have knowledge of mainland China, know how to use computer programs for travel agencies." Finally, it required two years in the job offered or in a related occupation that it called "bilingual consultant." AF 101. The Employer's language requirement was met by both U.S. workers who applied for the advertised position, since both Ms. Chua and Mr. Luc were bilingual in Chinese and English. Ms. Chua included Chinese with English as a spoken language, indicating dialects in Cantonese, Mandarin, Hokkien, and Hakka, in addition to spoken Malay and

[1]The CO then added further instructions that the Employer was to follow, if it decided to delete the foreign language requirement and revise the duties of the job.

Indonesian.[2] Mr. Luk spopke Cantonese,"some" Mandarin, a few other Chinese dialects, Malay, and Vietnamese.[3]

In analyzing Employer's business necessity for the language skills through the medium of its response to these applications, the required qualifications were compared with the resumes of the U. S. workers who applied for this job. It is well established that where a job applicant's resume does not meet all of the job requirements, if the resume of the U. S. worker shows a broad range of experience, education, and training, a reasonable possibility arises that the job candidate is qualified. The employer then is expected to investigate the applicant's credentials further by an interview or otherwise. **Dearborn Public Schools**, 91-INA-222(Dec. 7, 1993)(en banc); and see **Gorchev & Gorchev Graphic Design**, 89-INA-118(Nov. 29, 1990)(en banc). In this case, however, the Employer did not conduct an interview, but instead informed each of the candidates that it reagrded them as unqualified for this position, remarking in both cases that, "We need a person who is knowledgeable about China and understand (sic) Chinese practices." AF 127, 132. Mr. Luc later said that he felt he met the requirements but was not offered the job. The record does not contain the response by Ms. Chua to the inquiry by the State's Alien Laobr Certification Office. AF 126.

The academic and specialized training of both Ms Chua and Mr. Luc was very similar to the Alien's education. For example, after completing academic courses in tour management and hospitality management, Ms Chua worked from 1983 to 1990 in the operation of hotels in Kuala Lumpur and California. From 1983 to 1992 she was employed in supervisory positions, and she acquired detailed knowledge of hotel operations, a qualification that was not asserted by the Alien. AF 134-135. Mr. Luc graduated from the transportation management course at Academy Pacific Business and Travel College in Los Angeles, where for nearly one year he was given computer training in operating airlines' computerized systems. His other courses included the theory and practice of travel agency operation and management. In addition, from June 1991 to the date of his application his experience was entirely concerned with handling passenger flight and hotel reservations for airlines operating in China, the Philippines, and the Far East, none of which was offered in the Alien's application. AF 129-130.

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[2]At the time she applied, Ms. Chua was studying conversational Japanese, and was knowledgeable of national and international airports, cultures and customs of Malaysia, Singapore, Hong Kong, Japan, Australia, Switzerland, Indonesia, and Brunei.

[3]At the time he applied Mr. Luc also was studying conversational Japanese. In addition, he learned Malay as a high school student in Kuala Lumpur, Malaysia.

Even though both U. S. workers met the language requirement, the Employer's assertion of this special condition was not supported by proof of business necessity. The reason is that the Employer's statements of need were without explanation or factual support sufficient to prove that this job requirement is normal for the position or that it is supported by business necessity.' **Interworld Immigration Service,** 88-INA-490(Sept. 1, 1989), citing **Tri-Pls Corp.,** 88-INA-686(Feb 17, 1989). As a result, it is inferred that other candidates were discouraged from applying by this unduly restrictive condition of employment. **Venture International Associates, Ltd.,** 87-INA-569(Jan. 13, 1989) (en banc).

This inference was corroborated by Employer's failure to mention the language requirement in reporting the rejection of two U. S. applicants. Also, the CO had adequate grounds to consider that the Employer had rejected both U. S. candidates for the job for reasons that were contrary to law and could have denied certification for that reason. It is well established that certification cannot be granted in the absence of a good faith recruitment effort by the Employer. **H. C. LaMarche Enterprises,** 87-INA-607(Oct. 27, 1988). As the two U. S. workers who applied did meet the minimum qualifications for the job offered, Employer's rejection of U.S. workers who satisfied minimum requirements in the ETA 750A and in the required advertisement was unlawful. **American Cafe,** 90-INA-026(Jan. 24, 1991).

In general, a job applicant is considered qualified for the position who meets the minimum requirements specified by the employer's application for labor certification. **The Worcester Co, Inc.,** 93-INA-270 (Dec. 2, 1994); **Banque Francaise du Con@merce Exterieur,** 93-INA-44(Dec. 7, 1993). Even though Alien might have appeared well qualified for the job and better qualified for the position than any of the U.S. applicants, Employer's apparent rejection of the U.S. applicants on that basis was unlawful. **K Super KQ 1540-A.M.,** 88-INA397(Apr. 3, 1989)(en banc); **Morris Teitel,** 88-INA-9(Mar. 13, 1989)(en banc). Since the resumes of both U. S. workers appeared to meet the job requirements by a broad range of experience, education, and training, and it was reasonably possible that the applicants were qualified, the Employer was expected to investigate the applicants' credentials by interview or otherwise in this case. **Dearborn Public Schools,** 91-INA-222 (Dec. 7, 1993) (en banc); **Gorchev & Gorchev Graphic Design,** 89-INA-118 (Nov. 29, 1990)(en banc).

In this case, the Employer did not even interview either U. S. worker, even though it might then have rejected an applicant who met its requirements but was found incompetent to perform the main duties of the job, based upon information that it obtained from the interview. **First Michigan Bank Corp.,** 92-INA-256 (July 28, 1994).As the Employer did not interview the U. S. candidates,

its recruitment effort was insufficient, even though this was not the CO's reason for denying certification by reason of Employer's failure to demonstrate good faith effort to recruit.

Conclusion. The Employer's proof of the business necessity was not demonstrated in accordance with the NOF, based on the evidence discussed above. Consequently, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: **FIVE OCEAN TRAVEL, Employer**
SAI FAN CHIANG, Alien

Case No. : 95-INA-260

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

FREDERICK D. NEUSNER

Date: January 15, 1997